SUPREME COURT, U. S.
FILED
OCT 7 1949
CHARLES ELMORE CROPLEY
CLERK

NOS. 27, 30, 32

IN THE

Supreme Court of the United States

OCTOBER-TERM, 1949.

No. 27. 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

No. 30. 30

PORTO RICAN AMERICAN SUGAR REFINERY INC., *Petitioner*,

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CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

No. 32. 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENTS, CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY.

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BRIEF FOR RESPONDENTS, CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY.

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 194-197) is reported in 171 F. 2d 1016.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 24, 1948 (R. 198). Petitions for writs of certiorari were filed on February 18, 1949, and February 21, 1949, and were granted on April 25, 1949. The jurisdiction of this Court is invoked under United States Code, title 28, § 1254, and under § 205(e) of the Sugar Act of 1948.[1]

QUESTIONS PRESENTED.

This case involves the validity of Puerto Rico Sugar Order 18 issued by the Secretary of Agriculture January 21, 1948 (R. 160-175). By that Order the Secretary allotted for the year 1948 the Puerto Rican refined sugar limitation fixed by § 207(b) of the Sugar Act of 1948. The questions presented are—

1. Whether § 207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that the refined sugar limitation fixed by the section arbitrarily discriminates against the sugar refiners of Puerto Rico in favor of the mainland cane sugar refiners.

2. Whether Order 18 is invalid in that it allots the refined sugar limitation contrary to the requirements of § 205(a) of the Sugar Act of 1948.

STATEMENT OF THE CASE.

The Puerto Rican Mainland Sugar Quota.—Under § 201 of the Sugar Act of 1948 the Secretary of Agriculture determined that 7,200,000 tons[2] of sugar were needed to

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[1] 61 Stat. 922-934; U. S. C. (1946 ed., Supp. II), title 7, §§ 1101-1160. Text of pertinent provisions of the Sugar Act of 1948 is set forth in Appendix C to the brief of the Government of Puerto Rico.

[2] "Tons", as used herein, means short tons, raw value, as defined in § 101 (h) of the Act.

meet the 1948 requirements of consumers in the continental United States.[1] § 202 of the Act directs the Secretary to establish for domestic sugar producing areas and foreign countries quotas (aggregating the amount so determined) for sugar that may be brought into the continental United States from those areas and countries. The five domestic sugar producing areas (frequently referred to as "U. S. flag areas") are as follows: (1) the domestic beet sugar area (Ohio, Michigan, Nebraska, Montana, Idaho, Wyoming, Colorado, Utah, California, and other States); (2) the mainland cane sugar area (Louisiana and Florida); (3) Hawaii; (4) Puerto Rico; and (5) the Virgin Islands. For each of the five domestic sugar producing areas the respective quota is composed of a flat amount specified in § 202(a) of the Act, plus certain deficit amounts (Act, § 204) arising from the inability of any other domestic sugar producing area to market its quota, as determined by the Secretary. The quota for Puerto Rico is referred to herein as the "Puerto Rican mainland sugar quota." The Secretary's determination of the amount of the Puerto Rican mainland sugar quota for 1948 was 1,023,756 tons.[2] This constituted the total amount of sugar that Puerto Rico might bring into the continental United States in 1948 in any form—raw or refined.

The Puerto Rican Refined Sugar Limitation—§ 207(b) of the Act imposes a flat limitation of 126,033 tons on the amount of the Puerto Rican mainland sugar quota that may be brought into the continental United States

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[1] 13 F. R. 4473, Aug. 4, 1948. Earlier the Secretary had determined the amount for 1948 at 7,800,000 tons (13 F. R. 131-133, Jan. 9, 1948); 7,500,000 tons (13 F. R. 1145-1146, Mar. 3, 1948); and 7,000,000 tons (13 F. R. 2948-2949, June 2, 1948).

[2] 13 F. R. 7631-7633, Dec. 9, 1948. Earlier the Secretary determined the amount for 1948 as 934,134 tons (13 F. R. 133, Jan. 9, 1948); 982,436 tons (13 F. R. 4660-4661, Aug. 12, 1948); and 1,008,261 tons (13 F. R. 6043-6045, Oct. 15, 1948).

in the form of *refined*[1] sugar. This limitation is referred to herein as the "Puerto Rican *refined* sugar limitation", as distinguished from the "Puerto Rican mainland sugar quota." The 126,033 tons were approximately 12% of Puerto Rico's mainland sugar quota of 1,023,756 tons for 1948. As to that 12% Puerto Rican refiners must compete with the mainland cane sugar refiners in the purchase of the raw sugar for refining.

In consequence of the Puerto Rican refined sugar limitation the mainland cane sugar refiners have a monopoly of the refining of the remaining 897,723 tons, or approximately 88%, of the Puerto Rican mainland sugar quota. Puerto Rico is forced to ship this quota sugar to the mainland refiners for refining by them and Puerto Rican refiners are prohibited from competing with the mainland refiners for the marketing of it in refined form (Act, §§ 209 and 405). This deprives the Island of the opportunity to obtain annually an additional income of around $19,000,000.[2] The deprivation creates a corresponding gain in the income of mainland cane sugar refiners, including the ten intervening mainland refiners.

Allotment of the Refined Sugar Limitation.—§ 205(a) of the Act provides for the Secretary's allotting the amount of the Puerto Rican refined sugar limitation whenever he makes certain findings as to the necessity for allotment.

[1] The Act actually reads "direct consumption sugar", which is not necessarily refined sugar but in fact is composed almost entirely of refined sugar. Direct consumption sugar is sugar that is not to be further refined or otherwise improved in quality before consumption (Act, § 101 (e)) and is of three kinds—refined sugar, turbinado (semi-refined), and direct consumption raw sugar (i.e., sugar used for industrial purposes without further refining or improvement of quality, as in the manufacture of tobacco). In 1948 refined sugar accounted for about 97.4% of the direct consumption sugar brought into the States from Puerto Rico (on the basis of the Secretary's figures shown in 14 F. R. 1569, Apr. 5, 1949).

[2] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April 1948. See also, H. Rept. No. 2035, 80th Cong., 2d Sess., pp. 2-3.

The Secretary made the requisite findings (R. 145) and thereupon gave notice of a hearing on proposed allotments of the 126,033 tons (R. 145-148). On December 18, 1947, the hearing was held by a Presiding Officer designated for the purpose. No recommended decision was made by the Presiding Officer nor was any tentative decision issued by the Secretary, or opportunity afforded for exceptions. On January 16, 1948, Order 18 was issued by the Secretary (R. 175) and on January 22, 1948, published in the Federal Register (13 F. R. 310-313) and made effective immediately (R. 160-161).

On February 5, 1948, Central Roig Refining Company and Western Sugar Refining Company, two of the allottees (hereinafter referred to as "Roig" and "Western", respectively), filed with the Secretary their Petition for Stay and Reconsideration of Order in which they requested an opportunity to argue orally or by brief all questions of law relating to the validity of the Order (R. 176-178), including the constitutional and statutory questions here presented. This Petition was denied by the Secretary on February 11, 1948 (R. 178-179) and on the same day Roig and Western filed with the court below their Notice of Appeal and Petition for Review. Roig and Western raised therein two questions: First, a constitutional issue, namely, that the Puerto Rican refined sugar limitation is constitutionally invalid and the Order, being based thereon, was consequently invalid; and, second, a statutory issue, namely, that the Order did not conform to the statutory standards for allotments set forth in § 205(a) of the Act.

Subsequent to the appeal the following intervened:

(1) Porto Rican American Sugar Refinery, Inc., a Puerto Rican refiner and the largest allottee under the Order. Porto Rican American urged the statutory validity of the Order but took no position on the constitutional issue.

(2) Ten mainland cane sugar refiners, The American Sugar Refining Company, Godchaux Sugars, Inc., Henderson Sugar Refinery, Inc., Imperial Sugar Company, Inland Sugar Company, The National Sugar Refining Company, Refined Syrups and Sugars, Inc., Revere Sugar Refinery, Savannah Sugar Refining Corporation, and Western Sugar Refinery[1] which is the cane sugar refining department of J. D. and A. B. Spreckels Company. The mainland refiners urged the constitutional validity of the Order but took no position on the statutory issue.

(3) The Government of Puerto Rico. It urged the constitutional invalidity of the Order but took no position on the statutory issue.

Thus the Secretary and the ten mainland cane sugar refiners opposed Roig, Western, and the Government of Puerto Rico on the constitutional issue, and the Secretary and Porto Rican American opposed Roig and Western on the statutory issue.

Order 18 (after deducting an unallotted reserve of 5,169 tons, subsequently reduced to 1,000 tons, for marketing of

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[1] Not to be confused with Western Sugar Refining Company, a Puerto Rican refiner and one of the two appellants below and respondents here.

raw sugar for direct consumption) made refined sugar allotments for 1948 to six companies[1] as follows (R. 175):

Allottee	Tons Allotted Originally 1/18/48	Tons Allotted Revised[5] 10/23/48
Porto Rican American Sugar Refinery, Inc.	79,258	87,092
Central Aguirre Sugar Co., a trust	5,291	2,428
Central Roig Refining Co.	16,698	18,348
Central Guanica[2]	3,160	0
Western Sugar Refining Co.[3]	14,772	16,232
Central San Francisco[4]	1,685	933
Total	120,864	125,033

[1] The Government's proposal as set for hearing provided for an allotment to Central Camuy. However, no allotment was made for it was found that the company was no longer engaged in the manufacture of refined sugar and would not market such sugar in the continental United States in 1948 (R. 121, 174).

[2] The correct name is South Porto Rico Sugar Co. (14 F. R. 1570).

[3] Erroneously referred to as Central Igualdad in the Government's proposal as set for hearing. Central Igualdad is the raw sugar affiliate of Western.

[4] The correct name is Estate of Artúro Lluberas y Sobrinos (14 F. R. 1570).

[5] Order 18 originally issued in January was revised in October to reallot deficits of the three smaller allottees who had notified the Secretary that they would be unable to fill their allotments (13 F. R. 6232-6233, Oct. 23, 1948).

Of the six allottees only Porto Rican American, Roig and Western are primarily refiners and wholly dependent on refining. As refiners they compete with the large mainland cane sugar refiners on the eastern seaboard. Porto Rican American, Roig, and Western are all parties to this proceeding.

The other three allottees, Aguirre, Guanica, and San Francisco, are primarily producers of raw sugar, not refiners, and as such are not competitors of the seaboard refiners but, on the contrary, sell raw sugar to them and are

sources of raw supply for them. Aguirre and San Francisco, do not have refineries but their allotments actually cover turbinado, a semi-refined sugar, which can be produced in raw sugar mills. Neither Aguirre, Guanica, nor San Francisco is a party to this proceeding.[1]

All six of the refined sugar allottees also produce raw sugar directly or through affiliates. In 1948 they produced 356,059 tons of Puerto Rico's total production of 1,108,416 tons of raw sugar.[2] The remaining 752,357 tons were produced by raw sugar mills other than those of the six allottees or their affiliates. Five of the allottees (all except Porto Rican American) have, directly or through affiliates, raw sugar supplies of their own[3] in excess of both the amount permitted to be refined by them under the refined sugar limitation plus the amount they marketed locally

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[1] In addition, none of the three appeared at the hearing before the Secretary on the proposed order athough Guanica later filed a brief (R. 2, 169, 137).

[2] See Appendix III, p. 19 of the appendices to this brief and footnote 3 this page.

[3] For 1948 Porto Rican American produced through its affiliate, Mercedita, 60,982 tons of raw sugar and refined 96,225 tons for mainland and local consumption; Aguirre produced directly and through its affiliates, Machete and Cortado, 96,549 tons of raw sugar and refined 2,372 tons as turbinado sugar for mainland consumption; Roig produced through its affiliates, Ejemplo and Roig, 54,849 tons of raw sugar and refined 44,348 tons for mainland and local consumption; Guanica produced directly 96,935 tons of raw sugar and refined 15,539 tons exclusively for local consumption; Western produced through its affiliate, Igualdad, 40,394 tons of raw sugar and refined 30,691 tons for mainland and local consumption; and San Francisco produced directly 6,350 tons of raw sugar and refined 902 tons as turbinado sugar for mainland and local consumption. It takes approximately 1.07 tons of raw sugar to make one ton of refined sugar (Sugar Regulations, series 1, No. 1, issued Feb. 19, 1935).

See Appendix III to this brief. See also, The Gilmore Puerto Rico Sugar Manual, 1946-1947. At the request of Government counsel at the hearing the Secretary took official notice of this publication (R. 110-111). For Porto Rican American, see pp. 45-47 and 179-182; Roig, pp. 64-67 and 195-198; Western, pp. 79-80 and 167; Aguirre, pp. 42-45, 63-64, and 177-178; Guanica, pp. 74-77; San Francisco, pp. 201-203.

n Puerto Rico.[1] In consequence these five allottees are forced to forego refining of some of *their own* raw sugar supplies and to ship them to mainland refiners for refining,[2] as well as being denied the right to compete for the refining of the raw sugar of other Puerto Rican mills which produce the rest of Puerto Rico's quota sugar. This phase of the situation particularly affects Roig and Western since Aguirre, Guanica, and San Francisco did not choose to fill all their allotments and Porto Rican American did not have a sufficient supply of its own raw sugar to fill its allotment, but had to purchase additional raw sugar from unaffiliated outside raw mills.

The Secretary found that Puerto Rican refiners had a potential refining capacity for 1948 of 485,000 tons (R. 172), or more than twice the capacity necessary to meet both the refined sugar limitation of 126,033 tons plus local consumption requirements in Puerto Rico which for 1948 were 94,923 tons.

The Statutory Question.—§ 205(a) of the Act specifies that the allotments of the Puerto Rican refined sugar limitation shall be made by the Secretary in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of the quota *by taking into consideration* three factors: First, processings of sugar from sugarcane to which proportionate shares pertained; second, past marketings of the allottee; and third, ability of the allottee to market the portion of the quota allotted to him. In the Act these standards read in the conjunctive, not disjunctive. In Order 18—

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[1] For 1948 the aggregate amount marketed locally for consumption in Puerto Rico was 94,023 tons. See Appendix III to this brief. The Secretary may, under § 203 of the Act, fix a local consumption quota for Puerto Rico and allot it. He fixed a quota of 60,000 tons for 1948 (13 F. R. 3692, July 2, 1948; earlier 120,000 tons, 13 F. R. 131, Jan. 9, 1948) but did not allot the quota (13 F. R. 5207-5208, Sept. 8, 1948).

[2] Except 2,468 tons which the Puerto Rican refiners' raw mills were able to sell for consumption locally in raw rather than refined form. See Appendix III to this brief.

a. The Secretary measured the statutory standard of ability to market in the case of four of the six allottees by using 1935 (Porto Rican American), 1936 (San Francisco), 1939 (Guanica), and 1940 (Roig) *past* marketings (R. 173, 174). The court below held that the Act, properly interpreted, requires that the statutory standard of ability to market (if to be measured by performance rather than plant capacity) be measured by current performance, i.e., current, not past, marketings (R. 196).

b. The Secretary measured the statutory standard of past marketings by skipping over the years 1942 to 1947 and using the average of the marketings of the highest five years during the period 1935 to 1941 (R. 172, 174). The court below held that the statutory standard of past marketings plainly includes marketings within the last half dozen years, or at least the more recent of them (R. 196).

c. The Secretary gave equal weight to the statutory standards of ability to market and past marketings but gave no weight at all to the statutory standard of proportionate shares (R. 171, 174). The court below held that the Act, properly interpreted, does not justify the Secretary in failing to give any weight to the statutory standard of proportionate shares (R. 196-197).

Having decided the statutory points adversely to the Secretary and held Order 18 invalid on the statutory grounds, the court below by a divided vote held it was not authorized to decide the issue of the constitutional validity of § 207(b) on which the Order was based. It therefore reversed the Order and remanded the cause to the Secretary for further proceedings not inconsistent with the opinion of the court (R. 198).

Need to Decide Constitutional Question.—In placing the constitutional question ahead of the statutory question (as we have done under "Questions Presented") we are not unmindful of the rule that constitutional questions will not be considered where the case may be disposed of on other

grounds. Normally, a question on the statute would come first. But this case is not within the rule for postponing the consideration of a constitutional issue. The constitutional question needs to be decided for the case at bar cannot be fully disposed of otherwise.

Even if this Court decides all or any of the statutory points in favor of Roig and Western and affirms the judgment below on that ground, the relief would be only a part of what they ask. That is to say, a decision in Roig and Western's favor on the statutory points will give them relief *within* the invalid refined sugar limitation but it will fail to decide whether they are entitled to be relieved *from* that limitation altogether. Their constitutional point is that they are entitled to the latter. The difference is the right of a Puerto Rican refiner to compete with mainland refiners only within an allotted share of 126,033 tons as against the right to compete with them for Puerto Rico's entire mainland sugar quota which for 1948 was 1,023,756 tons.

The Secretary concedes that Roig and Western have a justiciable interest in the constitutional issue. He also concedes that that issue needs to be decided if this Court holds Order 18 valid as regards the statutory question (Br. 59). Our position, as we have said, is that the constitutional issue needs to be decided irrespective of the statutory question. Only by so doing can Roig and Western obtain the quantum of relief to which they are entitled. In consequence the statutory question need be decided only if this Court holds against us on the issue of the constitutionality of § 207(b) on which Order 18 is based. So we come to this Court with a primary question on the Constitution and a secondary question on the Statute.

Constitutional Question Is Before Court on Present Record.—The constitutional question was raised by respondents Roig and Western in their Petition for Stay and Reconsideration of Order before the Secretary of Agriculture (R. 177) and in their Notice of Appeal and Petition for Re-

view (R. 182).[1] It was briefed and fully argued in the court below but it was not there decided.[2]

Respondents Roig and Western opposed the petitions of the Secretary of Agriculture and Porto Rican American for writs of certiorari to review the judgment below on Order 18 as regards the statutory issue. They supported the petition of the Government of Puerto Rico for writ of certiorari to review the judgment below as regards the constitutional issue and to have this Court pass on that issue. In their brief opposing the petitions of the Secretary and Porto Rican American and supporting the petition of the Government of Puerto Rico, Roig and Western stated their purpose (if any of the petitions were granted by this Court) to support the judgment below on the ground that the statutory basis for Order 18 is constitutionally invalid, and pointed out that they are entitled

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[1] As a matter of precaution Roig and Western raised the constitutional issue, as well as the statutory question, before the Secretary even though they recognized (a) that the Secretary is of the view (and in this we agree) that a question as to constitutional validity of any portion of an Act administered by him is to be determined not by him but by the courts (*In the Matter of Mutual Orange Distributors*, 1 A. D. 207, 215; *In re Orange Belt Fruit Distributors*, 1 A. D. 469, 472; *In re Robert Berman*, 1 A. D. 472, 474; *In re Irving Sarnoff*, 1 A. D. 501, 502-503; *In re Abraham Paul*, 1 A. D. 561, 562-563; *In re Sydney Allen*, 5 A. D. 729, 737), and (b) that a constitutional question may on appeal properly be raised in the United States Court of Appeals even though not raised before the administrative officer or agency (*Panitz* v. *District of Columbia*, 112 F. 2d 39 (Ct. App., Dist. Col., 1940). Roig and Western further recognized that the Secretary proposed to allot the amount of the Puerto Rican refined sugar limitation notwithstanding its constitutional invalidity. They therefore participated in the allotment proceedings before the Secretary, including the hearing, to protect their rights so far as it might prove possible through such proceedings. Roig and Western exhausted all available administrative remedies.

[2] In delivering the opinion of the court below Judge Edgerton said: "A majority of the Court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether § 207 (b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it." (R. 197)

to urge *in support of the judgment below* any matters appearing in the record, citing *Langnes* v. *Green*, 282 U. S. 531 (1931), and other cases following it. Therefore having raised, briefed, and (as the court below stated in its opinion) "fully argued" the constitutional invalidity of Order 18, Roig and Western are here entitled to urge that matter in support of the judgment below as well as the statutory invalidity of the Order.

Scope of Constitutional Question.—The constitutional question presented by respondents Roig and Western will perhaps be clearer if we point out certain matters which, while somewhat related and interesting in themselves, are *not* now involved. Thus, this case is *not* concerned with the *foreign* commerce of the United States or with the *foreign* commerce of Puerto Rico; nor is it concerned with *local* commerce on the Island. Again, this case does *not* involve any requirement or contention that Puerto Rico must be treated in all respects as a State, or that a law of Congress must operate with complete uniformity over States and Territories. Still again, this case does *not* involve any derogation of Congress' power over commerce, including the regulation of commerce between Puerto Rico and the States. What the case *does* involve,—the precise question presented—is whether Congress must, in exercising that power, desist from arbitrary discrimination against the sugar refiners of Puerto Rico and in favor of the mainland cane sugar refiners on the seaboard.

The Secretary puts the matter with candor, we think, when he stakes the case on the proposition "that Congress may limit or prohibit the importation of goods from a territory in the same manner and to the same extent that it may deal with goods coming from foreign countries." (Br. 67). We take that to be the substance of his position as set forth in the main part of his argument on the constitutional point (Br. 66-71); and particularly so when, in addition to the proposition just quoted, he (and the seaboard refiners as well) draws an analogy to a "protec-

tive tariff" (Br. 69). It is just there that the issue is joined in this case as to the nature and extent of Congress' power —whether it is an arbitrary power or a power limited by due process of law. That is the constitutional question which needs to be decided in this case. It is an open question in this Court in that (as we shall show) it is not foreclosed by prior decisions.

SUMMARY OF ARGUMENT.

This case presents two questions, one constitutional, the other statutory. The constitutional question is concerned with the power of the United States to deal with its outlying possessions. It presents a problem as to the nature and extent of the power of Congress over commerce between Puerto Rico and the States. More specifically stated, it raises the question whether Congress, after the manner of "protective tariff" legislation, may arbitrarily limit the amount of *refined* sugar which may be brought into the States from Puerto Rico, to 12% of Puerto Rico's sugar quota.

Against the argument of the Secretary and the refiners that Congress may limit or prohibit commerce from Puerto Rico in the same manner and to the same extent as if Puerto Rico were a *foreign* country, we urge that such a concept of power is opposed by the due process clause of the Fifth Amendment which embraces the elementary principle of fairness. The clause prohibits arbitrary and gross discrimination against the Puerto Rican refiners in favor of mainland cane sugar refiners. Indeed, we suggest that the limitation on the amount of refined sugar from Puerto Rico is a throw-back to the theory of government which animated Great Britain in the time of George III, namely, to hold the Colonies to the inferior economic position of producing raw materials for processing in the mother country. Such a concept of government went by the board as a result of our own Revolution; its revival is offensive to the Fifth Amendment.

The status of Puerto Rico as "unincorporated territory" carries no legal conclusion in favor of the power urged by the Secretary and the refiners. Puerto Rico is not a foreign country; its people are citizens of the United States. But the political position of the Island does have a bearing on the case: Puerto Rico has no vote in Congress and cannot protect itself of right by political processes. The case exhibits an instance of discrimination without representation. This Court is peculiarly the forum for the determination of the issue.

The constitutional question in the case is an open one in this Court. It is not foreclosed by the Insular Cases or any others cited by the Secretary or the refiners, or as found by us. Examination of those cases reveals them as not concerned with the specific due process question presented here. Arbitrary discrimination is the sum of our complaint. We seek no relief on the ground that due process imposes a judicially enforceable substantive limitation on the power of Congress to regulate economic affairs. We freely acknowledge that power—as manifested, for example, in the non-discriminatory quotas for raw sugar.

The Sugar Act as a whole has a permissible objective but the refined sugar limitation is not an essential part. It has no necessary relationship to the stabilization of sugar production or marketing or to the surplus problem. Its effect and its purpose is to afford protection to the seaboard refiners from *competition* by the refiners of Puerto Rico.

The arbitrary character of the refined sugar limitation appears on the face of the statute and is demonstrated by its legislative history. It freezes Puerto Rican rights in 1948 by the fortuitous figure of tonnage from Puerto Rico to the States in the depression year of 1933. It has been denounced as discriminatory by President Roosevelt and by heads of Departments and in the debates in Congress. Its adverse consequence on the Island is not only to shut off the utilization of Puerto Rico's present refining ca-

pacity but also to debar industrial development of the Island by the expansion of the refining business.

The statutory question is whether the Secretary in allotting for 1948 the Puerto Rican refined sugar limitation has properly construed the three statutory standards of ability to market, past marketings, and proportionate shares. The three standards read in the conjunctive, not the disjunctive. Their use is mandatory and no other standards may be used.

The Secretary (a) actually made use of a non-statutory, extra-legal standard, namely, "restoration of prewar competitive relationships"; (b) erroneously construed the two statutory standards of ability to market and past marketings; and (c) gave no weight at all to the standard of proportionate shares.

The standard of ability to market means *current* ability, not past ability, yet the Secretary used *past* marketings in 1935, 1936, 1939, and 1940 as measures of the ability of four of the six allottees to market refined sugar in 1948. This is contrary to the prior administrative practice of the Secretary in using only current factors as measures of ability to market and is an erroneous construction of the statute.

The Secretary measured past marketings by skipping over marketings during the six years 1942-1947, and using the highest five years marketings during the seven-year period 1935-1941. Exclusion of 1942-1947 marketings is contrary to prior administrative practice of the Secretary in measuring past marketings by marketings during the three or four years last past and not using a "remote" period. The exclusion is an erroneous construction of the statute.

During the prewar period Porto Rican American, one of the six allottees, had a monopoly of Puerto Rican refining. During the years 1940 and 1942-1947 when quotas were suspended by the President or not in effect, Roig and Western made extensive inroads on this monopoly. To restore the monopoly the Secretary made use of a non-statutory,

extra-legal standard, namely, "restoration of prewar competitive relationships." That consideration was given to this standard, is admitted by the Government Witness in his testimony at the hearing on the Government's allotment proposal. The Secretary, in order to achieve his objective of restoration of prewar competitive relationships, or, in more blunt language, the restoration and maintenance of Porto Rican American's monopolistic position at its 1941 level, was forced to manipulate and erroneously construe the three statutory standards.

Abnormal wartime conditions are not a basis for failing to take into consideration marketings during any one or more of the years 1942-1947. The Act does not provide for measuring ability to market or past marketings by a period that the Secretary deems "representative" or for adjusting the standards for "abnormal wartime conditions." Wartime conditions did not have an effect on Porto Rican American substantially different from that had on other allottees. "Abnormal wartime conditions" is the cloak used by the Secretary to achieve the extra-legal objective of restoration of prewar competitive relationships.

ARGUMENT.

I. Section 207(b) of the Sugar Act of 1948 Violates the Due Process Clause of the Fifth Amendment In That the Refined Sugar Limitation Fixed by the Section Arbitrarily Discriminates Against the Sugar Refiners of Puerto Rico in Favor of the Mainland Cane Sugar Refiners.

At this point and for the reasons we have stated, we turn first to the constitutional part of our cause. For it is our contention that, irrespective of whether Order 18 conforms to the statute, the statutory provision fixing the Puerto Rican refined sugar limitation on which the Order was based, is itself invalid so that there could be no valid order at all. The acceptance of this contention will have little significance in the general operation of the Sugar Act (we

deal later with the question whether the limitation is an "integrated part" of the Act), but it will have very real and substantial consequences for refiners in Puerto Rico. A holding that § 207(b) is unconstitutional will break the monopoly it gives to the seaboard refiners, and Puerto Rican refiners will then be free to compete with them in the refining and marketing of all of Puerto Rico's quota sugar (averaging about one million tons annually). What we seek is freedom from the strangle-hold of that arbitrary limitation; and we seek it on the ground that due process of law denies Congress the power to impose any such arbitrary limitation on commerce between Puerto Rico and the States.

§207(b) of the Act provides:

> "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar."

Our case against the validity of the section involves two propositions: One, that the refined sugar limitation of 126,033 tons is an arbitrary discrimination against the refiners of Puerto Rico; the other, that due process of the law forbids such arbitrary discrimination. We present them separately and in that order.

A. The refined sugar limitation imposed by section 207 (b) is an arbitrary discrimination against the refiners of Puerto Rico.

For 1948 the amount of the Puerto Rican mainland sugar quota was 1,023,756 tons. Of that amount Puerto Rican refiners are permitted to compete for the refining of only 126,033 tons, or less than 12%. The rest of the quota may be shipped only as raw sugar to the ten intervening and other mainland cane sugar refiners for refining by them. Thereby the Act gives the mainland refiners a monopoly of the refining of 897,723 tons, or 88% of the Puerto Rican mainland sugar quota.

On the face of the statute 126,033 tons is an arbitrary and capricious figure. Nothing appears either in the statute itself or, so far as we can find, in its legislative history to show the appropriateness of the figure chosen as tending to the accomplishment of a legitimate end within the competency of Congress. To the contrary, the history of that particular provision shows it as being designed for the accomplishment of an illegitimate end, namely, the suppression of commerce from Puerto Rico for the benefit of the seaboard refiners—a type of suppression practiced against *foreign* countries.

The history of the Puerto Rican refined sugar limitation shows it to be arbitrary. The limitation dates back to the Sugar Act of 1934 (Jones-Costigan Act).[1] That Act imposed on Puerto Rico a refined sugar limitation equal to the highest amount of refined sugar brought into the continental United States from Puerto Rico in any of the years 1931 to 1933. That amount was 133,119 tons,[2] subsequently recomputed at 126,033 tons.[3] The 1934 Act was succeeded by the Sugar Act of 1937 which reenacted the refined sugar limitation of 126,033 tons for the period expiring March 1, 1940,[4] and thereafter the limitation was successively extended until December 31, 1947.[5] The present 1948 Act again extends the limitation—this time to December 31, 1952 (§ 411). However, for approximately half of this 15-year period, 1934-1948, the limitation has been sus-

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[1] The Sugar Act of 1934 was § 8a of the Agricultural Adjustment Act of 1933 (48 Stat. 670, subsequently validated by 49 Stat. 1539).

[2] General Sugar Quota Regulations, Series 2, Jan. 8, 1935.

[3] General Sugar Quota Regulations, Series 2, Rev. 1, Aug. 17, 1935.

[4] 50 Stat. 903, § 207(b).

[5] After expiring Mar. 1, 1940, the Puerto Rican refined sugar limitation was reenacted Oct. 15, 1940, to expire Dec. 31, 1941 (54 Stat. 1178), and thereafter extended to Dec. 31, 1944 (55 Stat. 872), to Dec. 31, 1946 (58 Stat. 283), and to Dec. 31, 1947 (60 Stat. 706).

pended or not in effect.[1] Actually the basis selected as the measure for Puerto Rico's refining is the depression year of 1933 when Puerto Rico's refining industry was new and comprised of but two refineries, one belonging to intervenor, Porto Rican American, and the other to Guanica (South Porto Rico Sugar Co.).[2] Roig did not commence full-scale operation as a refiner until 1937; Western until 1938 (R. 147). As to Roig and Western, then, there is no foundation whatever for the Secretary's assertion that the Puerto Rican refined sugar limitation has a "reasonable historical basis." (Br. 79) The Secretary's view of an "historical basis" is that Puerto Rican refining should be frozen to the amount of refined sugar shipped to the States in 1933 by two refiners (the amount shipped by one was insignificant), while the mainland refiners are given a monopoly of the refining of all other Puerto Rican quota sugar.

Even as to the 126,033 tons, the Puerto Rican refiners are subject to competition from the mainland refiners for the purchase of the raw sugar and the refining of it. On the other hand mainland refiners may refine all raw sugar they are able to purchase within the aggregate of sugar determined by the Secretary to be needed to meet the requirements for consumption in the States. In 1948 this aggregate was 7,200,000 tons of which approximately 5,512,000 tons was cane sugar. As to this amount the mainland refiners are freed by §207(b) from the competition of Puerto Rican refiners save only as to the 126,033 tons.

[1] The refined sugar limitation was not law from Mar. 1 to Oct. 15, 1940, pending the enactment by Congress of legislation extending the original 1937 Act, and was suspended by proclamations of the President pursuant to § 509 of the 1937 Act (50 Stat. 916) for the period from Sept. 11, 1939, to Dec. 26, 1939 (4 F. R. 3889, Sept. 13, 1939, and 4 F. R. 4941, Dec. 27, 1939); and for the period Apr. 13, 1942, to Nov. 28, 1947 (7 F. R. 2826, Apr. 16, 1942 and 12 F. R. 8011, Dec. 2, 1947).

[2] R. 154-158.

The situation above described may be set forth in tabular form as follows (figures in tons):

Sugar Producing Areas	Sugar Quotas 1948[1]	Amount of Quota Sugar Permitted to be Marketed in States as Refined Sugar[2]	Amount of Quota Sugar Permitted to be Competed for by Mainland Refiners	Amount of Quota Sugar Permitted to be Competed for by Puerto Rican Refiners
Domestic beet sugar area	1,687,738	All	All[3]	None
Mainland cane sugar area	413,260	All	All	None
Hawaii	825,000	29,616	All	None
Puerto Rico	1,023,756	126,033	All	126,033
Virgin Islands	6,159	None	All	None
Philippines	240,000	56,000	All	None
Cuba	2,940,467	375,000	All	None
Other foreign countries	63,620	All	All	None

[1] 13 F. R. 7631-7633, Dec. 9, 1948.

[2] Or as turbinado or direct consumption raw sugar.

[3] Available only to beet sugar, not cane sugar, refiners.

The retention of the 126,033-ton figure in the Sugar Acts of 1937 and 1948 as the measure of Puerto Rican refining is itself a mark of oppression; for it freezes Puerto Rican refining at the low level of 1933. Mainland refining may expand with increased population, increased consumption, improved economic conditions, and other factors—but not so for Puerto Rican refining. To have any limitation on Puerto Rican refining, in the face of the freedom accorded the mainland areas and the mainland refiners, is grossly discriminatory. To measure Puerto Rico's rights in 1948 by the fortuitous figure of trade in 1933 is, we submit, arbitrary and capricious without more.

But there is more, and it also is revealed by the legislative history. The Puerto Rican refined sugar limitation

was denounced by President Roosevelt as discriminatory. In approving the 1937 Act he issued a statement in which he said that the bill was "intended primarily to benefit the many thousands of farmers who produce beets and sugarcane and those who, at the place of production, refine the raw material into sugar" but that it had been "seriously impaired in its value by the inclusion of a provision intended to legalize a virtual monopoly in the hands of a small group of seaboard refiners."[1] When the extension of the limitation was under consideration in 1940, President Roosevelt wrote to the Chairman of the House Committee on Agriculture opposing restoration of the limitation (it was not then in effect, having expired by Congressional action), and said:

> ". . . The people of the Territory of Hawaii and the possessions of Puerto Rico and the Virgin Islands are American citizens who compose some of those minority groups in our population with local governments that lack the protections of statehood. If this circumstance were not given adequate consideration, it would be possible to destroy by legislation the livelihood of our citizens in the insular parts of the United States through the enactment of discriminatory prohibitions against their products; and they would possess no legal power to take counter measures in self-defense. Such a course of action, as I have pointed out on a previous occasion, would be tantamount to an imperialistic classification of citizens and a tyrannical abuse of minority rights that is utterly contrary to the American concept of fairness and democracy. Among the cases in point is the proposal to reinstate the former discrimination against the refining of sugar in the insular parts of the United States."[2]

When the matter of the refined sugar limitation was under full consideration in connection with the enactment of

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[1] Hearings before the Committee on Agriculture, House of Representatives, on Bills Relating to Sugar Legislation, Serial J, 76th Cong., 3d sess., April 10-12, 1940, pp. 212-213.

[2] Id., 214.

the 1937 Act, the Secretary of Interior wrote the Chairman of the House Committee on Agriculture in part as follows:

> "... The audacity of one little group of manufacturing monopolists, the cane refiners, in demanding a legalized monopoly for themselves illustrates the difficulties that Congress must face under a quota system in dealing with corporate aggregations of wealth which control the necessities of the daily life of our citizens. This, despite the long court record of this group of restraint of trade and the fact that the United States Tariff Commission investigated their claims and found they were not warranted in seeking governmental protection against even foreign competition. They insist on a legalized monopoly for themselves through embargoes against both domestic and foreign competition, ..."[1]

Later on July 12, 1937, the Secretary pointed out:

> "... The bill contains no restrictions on domestic cane sugar refining operations except with respect to the insular parts of the United States. This would mean that, contrary to the fundamental principles of democratic government, one group of American citizens would be compelled to suffer a wholly unnecessary and undesirable discrimination. It would also mean the setting up of trade barriers within the United States which would be contrary to the long-established principle of guaranteeing each part of our country the right to exchange its products freely with all other domestic areas . . . Under such a policy, which would tend to be expanded from time to time as a result of the pressure of special groups, the economic welfare of the insular parts of the United States could be completely destroyed . . ."[2]

and again on July 22, 1937:

> "... The administration's concern is that Hawaii, Puerto Rico, and the Virgin Islands receive fair treat-

[1] P. N. 135554, Dept. of the Interior, May 7, 1937.

[2] Hearing before the Committee on Finance, U. S. Senate, on H. R. 9654, 76th Cong., 3d sess., Oct. 2-3, 1940, p. 68.

ment. There is no limitation upon the refining of sugar in the mainland and there should be no discrimination with respect to the conduct of refining operations in our territories and island possessions. The provision which the refiners desire to become permanent law would deprive Hawaii, Puerto Rico, and the Virgin Islands of their rights to engage in interstate commerce in equality with the 48 States . . .'[1]

Turning from the Executive to the Legislative Branch, the legislative history again shows the arbitrary and gross discrimination involved. The debates on the floor of the House and Senate at the time the Sugar Act was originally enacted, at the time it was extended in 1940, and again in 1941, clearly demonstrate that the Act was designed to discriminate against Puerto Rico, Hawaii, and the Virgin Islands, in favor of the mainland refiners. Extracts from these debates are set forth for the convenience of this Court in Appendix II to this brief.

Restrictions on Puerto Rico's refining were urged by proponents in Congress as a "slight favor" to mainland refiners, to "take care of our own people," and in furtherance of "the first law of nature—self-preservation." The restrictions were necessary "to defend American labor," and to protect mainland refiners' "investments."

Never was the discrimination in good faith denied. It was merely excused.

Congressional opponents of the discrimination pointed out the fact of the trade barrier and that Puerto Ricans were not foreigners but citizens. It was said that similar discrimination against manufacture of Southern cotton or refining of Texas oil would not be countenanced. The policy of limiting the insular possessions in the manufacture of their own raw materials was the same as the British colonial exploitation policy that resulted in our Revolution. Preservation of the Sugar Trust's monopoly by legislation was being sought when competition should be encouraged.

[1] Id. p. 69.

Less than three or four thousand laborers could possibly be displaced even should Puerto Rico ever refine all its mainland sugar quota. The seaboard refiners already received a tariff subsidy. The Tariff Commissioner had reported against any need for increased duties even on refined sugar from foreign countries.

Everywhere one turns—to the Act, its legislative history, the President and his cabinet—even proponents of the legislation in Congress—the arbitrary and grossly discriminatory character of § 207(b), the denial of equal protection of the law embodied in it, is obvious. Only the Secretary of Agriculture and the intervening mainland cane sugar refiners are blind to that which is apparent to all others. But it was not always so as to the Secretary. Originally he saw, and in vigorous words opposed, the discrimination in a statement which his subordinates prepared for the Chairman of the Committee in charge of the bill in the House.[1] "Complete violation of traditional American policy," establishment of "discriminations against parts of America, inhabited by American citizens, in favor of a few mainland companies already highly privileged by this legislation," "essence of Old World colonialism," were some of the phrases used.

The Brookings Institution, in its report "Porto Rico and its Problems", published in 1930, states:

> "Cane is Porto Rico's leading crop and chief source of wealth. Of her total exports, which were valued at over $108 millions in 1928, well toward $56 millions were accounted for by three cane products—sugar, molasses, and alcohol. More than two-fifths of the Island's cultivated area and more than 11 per cent of its total area is under cane. Sugar manufacturers and cane cultivators pay directly nearly one-fourth of the insular and local taxes and support many accessory lines of business which contribute to the coffers of the government. In a word, the economic fortunes of Porto Rico

[1] Pp. 12-14 in the appendices to this brief.

are at present largely dependent upon this industry." (p. 611)

Sugar is Puerto Rico's leading industry. § 207(b) of the Act, however, denies to Puerto Rico greatly needed additional income from its most important industry. The Secretary of the Interior has recently again denounced the discrimination embodied in the Puerto Rican refined sugar limitation. In April of last year he wrote the Chairman of the Committee on Public Lands, House of Representatives, as follows:

". . . An example of such a discriminatory provision is to be found in subsection 207(b) of the 'Sugar Act of 1948' . . . This provision limits the amount of refined sugar which Puerto Rico may ship to the continental United States, a limitation which does not apply equally to the several states, and thus treats Puerto Rico as though it were not a part of the United States, but a foreign country. It has also proved to be detrimental to the insular economy having cost Puerto Rico, between the years 1934 and 1946, an estimated $220,000,000 in revenue. If this provision were repealed and Puerto Rico were allowed to market its sugar in a refined state, Puerto Rico would realize an additional $18,000,000 to $19,000,000 a year and would benefit from a resulting increase in job opportunities, more consumer income, and greater industrial development."[1]

Without § 207(b) as a bulwark, intervening and other mainland cane sugar refiners stand a chance of losing to Puerto Rico this large annual income. Release from this arbitrary and grossly discriminatory refined sugar limitation of which we complain, would permit the Puerto Rican sugar industry to go forward in the expansion and development of refineries, thus aiding industrialization of the Island. The ten mainland cane sugar refiners have inter-

[1] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April, 1948. See also H. Rept. No. 2035, 80th Cong., 2d sess.

vened in this case in the hope of saving this $18 or $19 million dollars a year for themselves at the expense of Puerto Rico. They are even unwilling to compete with Puerto Rican refiners for this amount and insist on a statutory monopoly that will assure it to them.

The Secretary offers several points in defense of the arbitrary discrimination in the refined sugar limitation, but they are without persuasive merit. Thus, for example, he argues that the quotas provided by the Act (§§202-205) on the amount of sugar that may be brought into the States, constitute "a restriction on the mainland refiners ... more severe than the [refined sugar] limitation on the Puerto Rican refiners" (Br. 82, bracketed matter added). The facts are that before the Sugar Acts *both* the mainland refiners and Puerto Rican refiners had the right to buy their raw sugar supplies anywhere, in any quantity. Under the Sugar Acts *both* mainland refiners and Puerto Rican refiners are limited to acquiring quota raw sugar. Actually under the Act no refiner, mainland or Puerto Rican, can refine and market in the States non-quota raw sugar, that is, raw sugar from Cuba, Louisiana, Florida, Puerto Rico, Hawaii, or elsewhere, in excess of the sugar quota for the respective area. A Puerto Rican refiner is subject to precisely the same restriction as the mainland refiner in this respect. Both are denied access to raw sugar in excess of quotas. *In addition*, Puerto Rican refiners (but *not* the mainland refiners) are by §207(b) limited to acquiring, for refining for consumption in the States, only 126,033 tons of quota raw sugar while mainland refiners may acquire any quota raw sugar for such purpose.

Again, the Secretary argues that the total amounts of raw sugar to be acquired varies from year to year with the Secretary's determination of domestic consumers' needs, while Puerto Rican refiners are guaranteed a fixed amount of 126,033 tons (Br. 82). But the answer is clear: The opportunity of the mainland cane sugar refiner to compete for a share of a total amount of raw cane sugar

ranging around 5,500,000 to 6,000,000 tons from year to year is of far greater value than the opportunity of the Puerto Rican refiner to compete for (not be guaranteed) only an allotted share of 126,033 tons.

The Secretary approaches the illusory when he points out (Br. 72) that the Act places no restriction on the right of any person to build a refinery and engage in the business of refining sugar from sugarcane, or on the right of any refiner in Puerto Rico to market his sugar anywhere in the world except in the States. So far as Puerto Rico is concerned, the right to build a new refinery and enter into the refining business is in large measure an empty right; for with the States as the principal market, production of additional refined sugar in Puerto Rico through building new plants or increasing capacity of existing plants would be futile in the face of the overall limitation of 126,033 tons. It is economically feasible for the mainland refiner to market sugar anywhere in the world,[1] *including* the States; but it is not economically feasible for the Puerto Rican refiner to market his sugar, produced within the "tariff wall" under tariff protected conditions, elsewhere than in the United States.

The mainland cane sugar refiners repeatedly state in their brief that the Sugar Acts restrict them to the use of 64% of their potential capacity which they assert to be 7,000,000 tons annually and that for this reason the Sugar Acts discriminate against them as fully as against Puerto Rican refiners. This "me too" theme runs throughout their brief and is apparently the main basis for their denial of the arbitrary character of the Puerto Rican refined sugar limitation.

Excluding the 1,687,738-ton domestic beet area sugar quota, the mainland seaboard refiners were entitled to compete for 5,512,262 tons of quota cane sugar for 1948, or ap-

[1] The benefit of drawback of duty permits the mainland cane sugar refiner to market abroad Cuban or other dutiable sugar refined by him.

proximately 79% of their asserted potential capacity. In this competitive field they actually marketed 5,155,558 tons for 1948,[1] or 74%, of their asserted potential capacity. In comparison, the Secretary himself found that the potential capacity of the Puerto Rican refiners for 1948 was 485,000 tons (R. 172). However, Puerto Rican refiners were limited to competing for 126,033 tons for mainland consumption plus 94,023 tons[2] for local consumption,—a total of 220,056 tons. This is only 45% of the Puerto Rican refiners' potential capacity as compared with the cane sugar refiners' actual figure of 74% for 1948. All that Roig and Western here urge is that they are entitled to *compete* for (not have a monopoly of) the remaining 897,723 tons of Puerto Rico's quota sugar which is now a monopoly of the mainland cane sugar refiners. The Puerto Rican refiners' geographic position makes it impossible (because of the back haul involved) for them successfully to compete for the refining of quota cane sugar from other producing areas except the approximately 6,000 tons of Virgin Islands quota sugar.

There is no sound factual basis for the argument that the Sugar Acts imposed any harmful restriction on the seaboard refiners' capacity that is required to be compensated for by the Puerto Rican refined sugar limitation. The Secretary states that the mainland refiners refined in 1948 only 69.1% of the total refined sugar distributed in the States (Br. 83), while in 1929, their highest pre-1934 Act year, they refined 76.9%. In Appendix I to his brief (p. 90) the Secretary makes reference only to percentage figures, not to quantities, and omits the years 1942 to 1947. However, from the Secretary's own data for the years shown, it appears that from 1929 to 1948 the total amount of refined sugar increased by 379,000 tons. From 1934 to date Puerto Rican refiners remained frozen by the refined sugar limita-

[1] U. S. D. A. Release 296-49, Feb. 11, 1949.

[2] See Appendix III to this brief.

tion. The decrease in the *percentage* of mainland cane sugar refining was attributable not to Puerto Rican refiners' competition for there was none save for the 126,033 tons, but to competition from the beet sugar refiners whose total distribution over the same period increased by several hundred thousand tons.

The mainland cane sugar refiners by means of elaborate tabular appendices to their brief (Apps. B and C) apparently argue that the gross discrimination embodied in § 207(b) is cancelled out by Government benefit payments to cane growers and increased sugar prices ("quota premiums" they call them) attributable to the general sugar quota system. We will likewise deal with the details of this argument in an appendix, i.e., Appendix I, pp. 1-3 of the appendices to this brief. For the moment it is sufficient to point out that it is no answer to the question of *power* involved in this case for the seaboard refiners to bring forward various matters of *policy* which have animated Congress in dealing with other aspects of Puerto Rico's economy. It is not to be supposed that Congress would be as harsh with the Island in all respects as it is with regard to refined sugar. And it is strange doctrine to suggest that the grant of a favor on the one hand justifies an abuse of power on the other. The stuff of this case in this Court—the point is worth repeating (*supra*, p. 14)—concerns the nature and extent of Congress' *power* over Puerto Rico's trade with the States.

In summary, the face of the Sugar Act shows, and the Secretary concedes, that the purpose of the Puerto Rican refined sugar limitation is to protect the mainland refiners from competition with Puerto Rico as to 88% of Puerto Rico's mainland sugar quota—to give the mainland refiners a monopoly over the refining of all save 126,033 tons of that quota. For 1948 this amounted to a monopoly for the refining of 897,723 out of the 1,023,756 tons of that quota. Even as to the 126,033 tons Puerto Rican refiners

have to meet the competition of the mainland refiners. Striking down § 207(b) of the Act would only remove the monopolistic protection now given the mainland refiners and permit Puerto Rican refiners to compete with them in the refining of the whole of the Puerto Rican quota of raw sugar. The Secretary found (R. 172) that even at present Puerto Rican refiners have the capacity to refine 485,000 tons, or more than twice the amount needed both for Puerto Rico's refined sugar limitation and for local consumption in Puerto Rico. The Act denies the presen' Puerto Rican refiners the right to use that capacity in competition with the mainland refiners.

B. Section 207(b), by imposing an arbitrary discrimination against the refiners of Puerto Rico, violates the due process clause of the Fifth Amendment.

Constitutional Question is an Open One.

At the outset we think it appropriate to say that so far as we have been able to ascertain the precise constitutional question presented by this case—whether commerce between Puerto Rico and the States is protected by due process of law against arbitrary discrimination by Congress—is an open one; it has never been decided by this Court. And we venture to suggest that the answer to the question will have deep significance in our own system of government—may, indeed, be significant on a wider front. For the case has to do with nothing less than the question of how a great power deals with its dependencies—more particularly it is concerned with relationships between the United States and Puerto Rico, and the nature and extent of the power of Congress over commerce between the Island and the States.

Even if the question were thought to be foreclosed by earlier decisions, we should not hesitate to ask the Court to re-examine them. Of the relatively few which may be invoked against our position the Insular Cases are the most

nearly pertinent, particularly as exemplified by *Downes* v. *Bidwell*, 182 U. S. 244 (1901). We will discuss that case and others, in due course. At the moment and in the present connection we desire to say only this: The Insular Cases represent the effort by this Court, when confronted with a new and pressing problem on the heels of the war with Spain, to formulate doctrines for the assimilation of recently acquired outlying possessions into our constitutional system; but they should not stand in the way of a full consideration of the present problem in the light of what has happened in almost a half century since the Insular Cases were decided.

On the basic problem in this case our contention is that commerce between Puerto Rico and the States is protected by due process of the law against arbitrary discrimination by Congress. We recognize of course that Roig and Western's litigable interest may be restricted to the adverse effect of § 207 (b) on themselves, but we point out that this adverse effect extends to Puerto Rico as a whole, so that the fate of Roig and Western is tied up with the fate of the Island. The larger interests of the Island are set forth in the brief of the Government of Puerto Rico.

ARBITRARY DISCRIMINATION IS THE SUM OF OUR COMPLAINT.

We do not ask relief on the theory that due process of law imposes a judicially enforceable substantive limitation on legislative power in the regulation of economic affairs. We freely acknowledge a large power in Congress to regulate commerce between Puerto Rico and the States, just as it may regulate commerce among the States themselves—as for example in *Mulford* v. *Smith*, 307 U. S. 38 (1939); *United States* v. *Darby*, 312 U. S. 100 (1941); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). We invoke rather judicial protection against arbitrary discrimination in the exercise of that power. Just as the courts strike down state laws which discriminate against national interests

in interstate commerce so may they strike down Congressional laws which discriminate against local interests in such commerce. If Congress were to single out a State of this Union and fix grossly discriminatory quotas on the amount of its cotton, oil, beets or cane which could be sent, in manufactured or refined form, to other States there would be little doubt that the quota would fall. Despite the absence of an equal protection clause running against Congress (cf. the Fourteenth Amendment against the States), it has never been denied that due process includes such an indispensable attribute of freedom as equality before the law, *Truax* v. *Corrigan*, 257 U. S. 312, 331-332 (1921); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). Nor can it be doubted that due process limits the commerce power of Congress; if citation of authority be needed it is enough to say that such a limitation has been accepted since the earliest mention of the matter in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), to the latest full-scale consideration in *Currin* v. *Wallace*, 306 U. S. 1 (1939), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

In what we have said up to now we have been endeavoring to put before the Court the affirmative argument for the application of the due process clause to invalidate the arbitrary limitation imposed on Puerto Rico's right to trade with the States. But we think our argument, especially the part still to be offered, will stand in better perspective if, at this juncture, we turn to the Secretary's brief in order to see what manner of showing can be made against the position of respondents Roig and Western and in favor of the Secretary's position that Congress may deal with commerce from Puerto Rico to the States on exactly the same basis that it may deal with commerce from *foreign* countries.

"Protective Tariff" is the Sum of the Secretary's Case.

From whatever angle the basic question in this case is approached by the Secretary, as well as by the intervening refiners, the matter comes down to the justification of the Puerto Rican refined sugar limitation on the theory of a protective tariff—protection of the seaboard refiners, be it noted, against competition from another section of the United States economy. When the Secretary and the seaboard refiners maintain that Congress may impose a protective tariff as against trade from Puerto Rico, they are —despite their protestations to the contrary—contending for the possession by Congress of an absolute and arbitrary power over that trade. It is against this conception of power in Congress to play off one part of the United States against another that we are contending.

Cases Cited by the Secretary.

The Secretary opens his constitutional argument with cases—*Buttfield* v. *Stranahan*, 192 U. S. 470 (1904), and *Hampton & Co.* v. *United States*, 276 U. S. 394 (1928)—on the point that Congress is free to deal at its pleasure with *foreign* commerce. That these cases, as well as others, establish the powers as to *foreign commerce*, no one would deny. But whatever else may be true in the present cause, this much at least is indisputable: Puerto Rico is not a country foreign to the United States. It is within the allegiance and under the jurisdiction of the United States. Its citizens are citizens of the United States. Despite the "protective tariff" argument on which the Secretary and the seaboard refiners heavily rely, Puerto Rico is *within*, not outside, the "tariff wall" of the United States. Duties under the Tariff Act of 1930 are not applicable to imports into the States from Puerto Rico and are applicable

to imports into Puerto Rico from foreign countries.[1] So, the Secretary is under the burden of establishing that, though Puerto Rico is not foreign, yet Congress may deal with commerce between Puerto Rico and the States precisely as if it were foreign commerce. For that purpose he invokes several cases, all of which we will examine but none of which, we submit, establishes his position.

Downes v. *Bidwell*, 182 U. S. 244 (1901), already mentioned by us as the most nearly pertinent case against our own contention, is the Secretary's principal reliance. But that case was concerned, not with a due process problem, but specifically with the validity of a federal impost on goods from Puerto Rico challenged as in violation of the express requirement that such imposts shall be "uniform throughout the United States." The diversity of views of the Justices (they divided 5-4 and delivered five opinions) attests the complexity of the problem and the lack of agreement on its constitutional solution. No opinion commanded a majority. But it is unmistakably clear that the question had to do with the geographical aspect of the provision relating to uniformity "throughout the United States." Thus, by Justice Brown in announcing the conclusion and judgment:

> "... We are now asked to hold that it [Puerto Rico] became a part of the *United States* within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States' ...

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[1] U. S. C., title 19, § 1001; title 48, § 739.

The seaboard refiners assert that as a "legal fact" Puerto Rico is "not a part of the United States". That assertion begs the question as to whether the due process clause prohibits arbitrary exercise of the power of Congress to regulate commerce between Puerto Rico and the States. Even prior to its being embraced in the customs union of the States, Puerto Rico was not a "foreign country" within the meaning of the protective tariff laws, but was a "territory of the United States" (*DeLima* v. *Bidwell*, 182 U. S. 1 (1901)).

> "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. *There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.*" (pp. 249 and 276, emphasis and bracketed matter supplied)

Again, Justice White, with whom Justices Shiras and McKenna concurred, was of the view that—

> ". . . undoubtedly there are *general prohibitions in the Constitution* in favor of the liberty and property of the citizens . . . *which are an absolute denial of all authority* under any circumstances or conditions to do particular acts." (p. 294, emphasis supplied)

The due process clause contains no specific geographical limitation.

Nor is *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), a controlling precedent. That case was concerned, not with any problem at all in respect of the power of Congress and possible limitations thereon, but with the validity of a State *ad valorem* tax on goods from the Philippines challenged as in violation of the express prohibition of imposts by a State. The Court, using the "original package" rule, invalidated a State *ad valorem* tax on hemp from the Philippines. The Court said that the articles in question were "imports" because "the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to [taxation of] imports are applicable." The majority confined the discussion to the Philippines (p. 672); they cited Congressional statutes—e.g., the Philippines Independence Act—which have no comparable counterparts with respect to Puerto Rico; four Justices dissented from the application of the original package rule; and—a most unusual occur-

rence—*five* Justices protested against the economic consequences of the decision.

These cases, then, are concerned with specific geographical limitations on the *taxing* power of the Nation and States. They do not preclude this Court from determining, on the merits and having regard to specific differences in applicability of various provisions of the Constitution, the extent of the *regulatory* power of Congress over commerce between Puerto Rico and the States. So far as they are concerned, they leave the question in this case open for decision now.

Cincinnati Soap Co. v. *United States*, 301 U. S. 308 (1937), does not go to the present issue. It was concerned with the validity of a federal excise on the processing of cocoanut oil in the United States. The law was of general operation; it did not single out the products of the Philippines for the imposition of the tax. Tested as a tax it was "unassailable", said the Court. The principal question in the case arose over the "earmarking" of the proceeds to the extent they were derived from oil from the Philippines—a very real question at that time in view of the decision (the preceding year) in *United States* v. *Butler*, 297 U. S. 1 (1936) where a divided Court attached adverse consequences to the earmarking provision in the Agricultural Adjustment Act of 1933.

The liquor cases[1] cited by the Secretary are of no moment. Whatever the explanation of the many and diverse decisions concerning legislative power over intoxicating liquors, this Court wrote its own caveat against them when, sustaining the Webb-Kenyon Act, it said that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." *Clark Distilling*

[1] *Endleman* v. *United States*, 86 Fed. 456 (C. C. A. 9, 1898), and *Bacardi Corp.* v. *Domenech*, 311 U. S. 150 (1940).

Co. v. *Western Md. R. Co.*, 242 U. S. 311 (1917). Nor does *Alaska* v. *Troy*, 258 U. S. 101 (1922), also invoked by the Secretary, help his cause. The case is not even in point; it was concerned with a different question and holds merely that a Territory is not a "State" within the specific prohibition against preferences for "ports of one State over those of another."

Thus the cases cited by the Secretary appear not to support his contention that Congress may deal with commerce between Puerto Rico and the States precisely as if it were *foreign* commerce; and we repeat our earlier statement that as far as we have been able to ascertain the precise constitutional question presented by this case has never been decided by the Court. But the Secretary also offers other considerations in support of his position. They are concerned with (a) the integration of the refined sugar limitation into the Sugar Act as a whole, and (b) the status of Puerto Rico as "unincorporated territory" of the United States. We turn now to their examination.

The Puerto Rican Refined Sugar Limitation Is Not an Integrated Part of the Sugar Act.

The Secretary argues that the refined sugar limitation fixed by § 207(b) is an "integrated part" of the Sugar Act of 1948 (Br. 60). The Secretary would seem to be urging that since the general quota system is valid, the tail goes along with the dog and therefore the Puerto Rican refined sugar limitation is valid. The tail belongs to a wholly different breed of dog.

This part of the Secretary's argument is mainly assertion, with little supporting proof; and it is open to the objection that the assertion does not accurately describe the situation. If we may be permitted a counter-assertion, we suggest that the limitation is an "engraftation" upon, rather than an "integrated part" of, the Sugar Act. § 207(b) was set up at the behest, and for the benefit, of the mainland refiners. The most cursory

examination of messages of President Roosevelt and the Secretary of the Interior, quoted *supra*, pp. 22, 24, and of the debates on the floor of Congress, demonstrates this. See p. 6 of the appendices to this brief.

The President's message (78 Cong. Rec. 2176) in which he first asked Congress for sugar legislation, indicates that he had in mind a raw sugar quota system for the benefit of farmers and consumers—not a refined sugar quota system (which he vigorously opposed) for the benefit of the mainland refiners. The President set forth in specific figures the quotas that he had in mind and in each instance they were raw sugar quotas, not refined sugar quotas or limitations. And he nailed the refined sugar limitation down for what it is, in his statement accompanying his approval of the Sugar Act of 1937. He there said (the statement is quoted *supra*, p. 22) that the original bill had been "seriously impaired" by the inclusion of the quota legalizing the "virtual monopoly in the hands of a small group of seaboard refiners."

In Congress Representative Hope of Kansas openly declared: "*All these refiners are doing is hitch-hiking on a bill for the relief of the domestic sugar producing industry.*" (81 Cong. Rec. 8439.) The situation was fairly analyzed by Representative Lanzetta of New York when he said:

> "There are two phases to this bill—one agricultural wherein raw sugar quotas are allotted to the various producing areas in the United States and some foreign countries, and the other industrial, wherein limitations are put upon Hawaii, Puerto Rico, and the Virgin Islands as to the amount of direct consumption or refined sugar which they can produce.
>
> "Puerto Rico has no quarrel whatsoever with the quota . . . insofar as raw cane sugar is concerned. . . . They contend that if no limitation is placed in this bill on the direct consumption or refined sugar manufactured in the continental United States, that there should be no restriction placed on the . . . direct consumption or refined sugar [manufactured] in Puerto Rico. . ."—81 Cong. Rec. 8301, bracketed word added).

There is no showing, nor does the Secretary suggest, that the refined sugar limitation has any necessary relationship to the stabilization of sugar production or marketing or to the surplus problem. Obviously the refined sugar limitation does not affect the total supply of and demand for sugar but merely the question as to who may refine Puerto Rico's raw sugar produced for continental consumption—whether the mainland refiners shall have a monopoly for refining 88% of it, or whether they shall have to compete with Puerto Rican refiners for the refining of 100% of such sugar, instead of only 12%.[1]

Mulford v. *Smith*, 307 U. S. 38 (1939), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942), cited by the Secretary (Br. 76), dealt with plans to maintain a proper balance in the supply of, and demand for, tobacco and wheat. Those cases, involving laws of general operation, in no wise dealt with arbitrarily discriminatory quotas or with anything remotely resembling an arbitrary limitation on processing in one area of the United States for the benefit of processors in another area. In *Gay Union Corporation* v. *Wallace*,[2] the United States Court of Appeals for the District of Columbia Circuit, sustaining the validity of the Sugar Act of 1937 as a regulation of commerce, had before it and

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[1] The Secretary (Br. 62) attempts to tie in the Puerto Rican refined sugar limitation as an integral part of the Act by referring to certain provisions of the Act and the House Committee on Agriculture's report thereon. These provisions state that the Act is for the protection of "those engaged in the sugar industry" and that the bill had as a primary object "the stabilization of the sugar producing, refining, and importing industry." The Secretary implies that the mechanism of the refined sugar limitation on Puerto Rico is the method of accomplishment of these objectives. This is in error.

Stabilization is an objective under the Act both in the mainland cane sugar area and the domestic beet sugar area with respect to which there are no refined sugar limitations, as well as the offshore sugar areas with respect to which there are such limitations. The Act accomplishes the objective by limiting the quantities of sugar (not the quantities of refined sugar) coming to market from each sugar producing area.

[2] 71 App. D. C. 382, 112 F. 2d 192 (Ct. App. D. C., 1940), cert. denied 310 U. S. 647 (1940).

was dealing with solely the non-discriminatory raw sugar quota plan. The case in no wise involved the refined sugar limitations imposed on Puerto Rico, Hawaii, and the Virgin Islands.

The argument is not sound that validity of the general regulatory scheme will carry with it the validity of all its parts. Our attack is upon the refined sugar limitation as a separable part of the Sugar Act—a part that can be excised without jeopardizing the remainder of the Act.[1] The absence of a separability clause is not controlling. Inclusion of such a clause does little more than emphasize well settled rules of statutory construction.

The Status of Puerto Rico.

The Secretary makes much of the point that Puerto Rico is an "unincorporated territory" of the United States (Br. 63). Even assuming *arguendo* the correctness of the characterization, we vigorously deny the legal results sought to be attached to it. If the doctrine of incorporation has any definite significance, it is with respect to the applicability of various guaranties of the Constitution within a given territory—for example, whether a person there accused of crime is entitled to trial by jury within the meaning of the jury provision. On such matters the inquiry moves on lines similar to those where the Court is called upon to determine, pursuant to what has been called a "selective process," whether a specific protection in the Bill of Rights is deemed so fundamental as to be embraced by the Four-

[1] The seaboard refiners emphasize that under §§ 408 and 207 (g) of the 1948 Act the President may by proclamation suspend the operation of quota provisions except that the Puerto Rican and other refined sugar limitations may not be suspended unless the President in addition makes a specific finding with regard to those limitations. The seaboard refiners urge that this indicates that the Puerto Rican refined sugar limitation is an integrated part of the Act. To us the fact that a specific finding is required for suspension of refined sugar limitations, separate and apart from the suspension of the rest of the Act, indicates that Congress itself regarded the Puerto Rican and other refined sugar limitations as separable from the rest of the Act.

teenth Amendment and made applicable to the States. In such situations the terms "incorporation" and "fundamental" involve conclusions of law rather than rules for judicial guidance.[1] In any event, and emphatically so, this case is concerned, not with the power of Congress to legislate in respect of local affairs on the Island, but with the protection of the life-line of trade between Puerto Rico and the States. The Secretary tends to confuse the matter before the Court when he declares that the "precise issue" is whether Congress, in the exercise of its "*plenary powers to govern a territory* and to regulate its commerce may regulate the economy of the territory differently from the economy of the United States" (Br. 65, emphasis supplied).

Discrimination Without Representation.

There is, however, an aspect of Puerto Rico's status to which the Secretary does not allude but which we deem highly significant. We refer to Puerto Rico's want of representation in Congress. In fact, as we now resume our own argument (after having examined the case made on behalf of the Secretary), we suggest, first, that this Court is peculiarly the forum for the decision of the constitutional question raised in this case and, second, that there are special historical grounds for deciding it in favor of the Puerto Rican refiners.

This Court is peculiarly the forum for two reasons: One, because in truth there is no other forum in which Puerto Rico may *of right* be heard on her grievance against such arbitrary action as is here complained of; and the other, because of the function of this Court in our constitutional system for determining whether powers exerted by government are within the consent of the governed. These reasons are strongly interwoven in this case. In

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[1] See comments on the phrase "affected with a public interest" in *Ribnik* v. *McBride*, 277 U. S. 350 (1928), and then compare *Nebbia* v. *New York*, 291 U. S. 502 (1934). See also comments on "direct" and "indirect interference" (with interstate commerce) in *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927) and then compare *California* v. *Thompson*, 313 U. S. 109 (1941).

exposition of principles involved in the doctrine of judicial review in constitutional cases this Court has indicated a certain relationship between the exercise of judicial power and the operation of political processes. Thus, for example, the suggestion, originating with Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 435 (1819), and renewed by Stone in *Helvering v. Gerhardt*, 304 U. S. 405, 416 (1938), that judicial intervention may not be needed to protect the States against national encroachment, that is, to shield the parts from action by the whole—has for its basis the fact that the people of the States, acting through their representatives in the Senate and House, are in position to protect themselves. But the people of Puerto Rico are outside that reasoning. They have no vote in the body which imposed the limitation on them. This case, then, exhibits arbitrary discrimination against people who are denied representation; it presents an appropriate occasion for judicial inquiry.

Special Historical Grounds for Relief.

There are special grounds, on the firm foundation of our early history, why the judicial inquiry in this case should result in judgment in favor of Puerto Rico. For § 207(b) of the Sugar Act of 1948, with its limitation on sugar refining in Puerto Rico, is a throw-back to the mercantilist theory of the Revolutionary period.

> "The British Empire of which George III became sovereign in 1760 was shaped largely by the principles of mercantilism . . . By mercantilist theory, the function of colonies was to produce raw materials for the use of the mother country, to consume its manufactures and to foster its shipping; and the purpose of the Laws of Trade and Navigation was to ensure that the English colonies fulfilled these ends. This implied, as mercantilists readily admitted, that the colonies were to remain dependent agricultural regions, closely tied to the economy of an industrialized mother country. No mercantilist saw any impropriety in consigning the Western Hemisphere to a position of perpetual economic inferiority."—Prof. John C. Miller, Origins of the American Revolution, pp. 4-5 (1943).

We urge that the Constitution of the United States was not framed to grant Congress power to impose on commerce with our present day "colonies" the same kind of regulation we successfully fought when Parliament attempted to impose it on the thirteen original Colonies. The issue here presented was decided by the People at the time of the Revolution and their decision was woven into our Constitutional fabric. The position of the ten intervening refiners is that the Constitution does permit Congress to compel Puerto Rico to function primarily as a producer of raw material for the seaboard refiners and to consign Puerto Rico and its refiners to a position of perpetual economic inferiority. The Secretary agrees with the seaboard refiners. We think the primary principle of fairness embodied in due process of law is opposed to any such conception of the power of government under the Constitution of the United States.

II. Order 18 Is Invalid In That It Allots the Refined Sugar Limitation Contrary to the Requirements of Section 205(a) of the Sugar Act of 1948.

The statutory question concerns the failure of Order 18 to conform to the statuory standards set forth in §205(a) of the Act. The necessity for decision of the statutory question arises only if this Court holds against us on the constitutional question (see *supra*, p. 11.) Basically the statutory aspect of this case is a fight between three Puerto Rican refiners—two Davids, Roig and Western, against a Goliath,[1] the intervenor Porto Rican American. The Secretary is on Goliath's side.

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[1] Goliath, "6 cubits and a span" (9 ft. 7 in.) tall, approached twice the size of David who was "but a youth" and "a stripling." 1 Samuel, ch. 17.

A. Order 18 is actually based on a standard not authorized by law.

Section 205(a) of the Act reads in part as follows:

> ". . . . *Allotments shall be made* in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, *by taking into consideration* the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (h) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him . . ."

The Act requires "fair, efficient, and equitable" allotments of Puerto Rico's refined sugar quota. *But such allotments may be arrived at only "by taking into consideration" the three standards of proportionate shares, past marketings, and ability to market. Such allotments may not be arrived at by failing to take into consideration any of such standards, nor by taking into consideration some other standard.* It is not even sufficient for the Secretary to hide behind a claim that the allotments are fair, efficient, and equitable. He must have arrived at fair, efficient, and equitable allotments by taking into consideration the three standards and only those standards.

Like the constitutional question, the statutory question also has a monopoly aspect, but one distinct from that in the constitutional question. When the refined sugar limitation was first established in 1935 there were only two Puerto Rican refiners marketing refined sugar in the States. One was Porto Rican American and the other Guanica (South Porto Rico Sugar Co.). The first order of the Secretary allotting the refined sugar limitation (i. e., the order for 1935) gave Porto Rican American 118,217 tons, or 95.70% of the amount allotted, and Guanica 5,312 tons, or 4.30% (R. 154-158, 42). Roig and Western did not come into full-

scale operation as refiners until 1937 and 1938, respectively. During the years 1940 and 1942-1947, when the refined sugar limitation and allotments thereof were suspended or not in effect, Roig and Western made extensive inroads on this monopoly (R. 147). Now the Secretary proposes to restore, reinforce, and foster the monopoly, at least at its 1941 prewar level. This is done pursuant to a departmental policy which glosses over "monopoly" by the more felicitous phrasing of "restoration of prewar competitive relationships" The policy is not one of the three statutory standards and is without authority in law.

Congress did not intend the Act to preclude new entrants into the field of Puerto Rican refining. The two statutory standards of ability to market and proportionate shares confer a right to some allotment even in the absence of past marketings. Nevertheless, Porto Rican American regards the amount of the refined sugar limitation as its personal perquisite since it was based primarily on Porto Rican American's performance in 1933 and since Porto Rican American had a refinery and Roig and Western did not when the refined sugar limitation was first allotted in 1935. By implication Porto Rican American says that Roig and Western, having gone into the refining business after that date, should not reasonably expect to participate in the allotment of the refined sugar limitation at the expense of Porto Rican American's monopoly. In Order 18 the Secretary took the same position.

Order 18 purported to be based on two of the three statutory standards, namely, ability to market and past marketings. *We are of the view that the Order was actually based on a standard not found in the Act, namely, restoration of prewar competitive relationships.* To give effect to this illegal standard the Secretary erroneously construed and manipulated the three statutory standards so as to convert them into a single extra-legal standard of restoration of prewar competitive relationships and thereby restore and reinforce the monopoly of Porto Rican American among Puerto Rican refiners. That this result was achieved is

obvious from a comparison of the three Puerto Rican refiners' refined sugar entries into the States in 1941 with their Order 18 allotments for 1948:

Refiner	1941 Entries[1] (Tons)	1948 Allotments[2] (Tons)
Porto Rican American	79,237	79,258
Roig	15,028	16,698
Western	13,017	14,772

[1] R. 147.
[2] R. 175.

That restoration of prewar competitive relationships was "taken into consideration" is admitted in the record by the Department.

As early as June 10, 1947, the Director of the Sugar Branch wrote Arthur L. Quinn, attorney for Porto Rican American, that—

> ". . . *we believe that when* [war time] *controls are removed the various segments of the industry should, insofar as possible, occupy the same relative positions as they occupied prior to such controls. . . .*" (R. 158-9) emphasis and bracketed matter supplied)

The Department used Order 18 to place this belief into effect.

The proposed allotments in the Notice of Hearing were "worked out" by the Government Witness, Davis, "in conjunction with" the Director of the Sugar Branch (R. 26). The proposed allotments differed in only one minor respect from the final allotments in Order 18. The Government Witness is *the representative of the Department* designated by the Director of the Sugar Branch to testify on behalf of the Department at the hearing.[1] Davis was so designated (R. 149).

[1] Rules of Practice, § 801.27(b), 12 F. R. 8226, Dec. 9, 1947.

While the extra-statutory standard of restoration of prewar competitive relationships passed *sub silentio* in Order 18 itself, it was freely articulated by the Government Witness at the hearing. In explaining why the Department proposed to ignore marketings in the war and postwar years in measuring the statutory standards of past marketings and ability to market, he testified—

> "The wartime years are also considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industries." (R. 6)

and this testimony was twice repeated (R. 29, 31). Thus at one point Government counsel asked him (R. 29)—

> "Does the Department have any policy which you could state for the record, with respect to making allotments in a way that would not perpetuate this wartime pattern of competition between the companies?"

and the answer was—

> "As I mentioned on page 6 of my statement this morning, the wartime years were all so [sic] considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industry."

The Government Witness further stated that wartime restrictions changed the competitive positions of the parties interested in the hearing (R. 29) and that the entries of direct consumption sugar into the continental United States during the war and postwar years were completely out of line with competitive positions during the prewar years (R. 31-32). The contrast between the asserted bases of allotment in Order 18 and the Government Witness' testimony as to the basis is clear and sharp.

The record demonstrates that restoration of prewar competitive relationships is considered by the Department not only as a standard for allotments but as the primary

standard and the end to which the whole statutory machinery of making allotments is to be directed in this instance. The statutory standards of past marketings and ability to market are made to serve as cloaks for the standard actually used.

The situation is pointed up even more forcefully by the allotments made by the Department in April of 1947. The Puerto Rican refined sugar limitation of 126,033 tons was not in effect since quotas under the Sugar Act of 1937, including that limitation, had been suspended since 1942 by action of the President under § 509 of that Act. Notwithstanding, an equivalent of the limitation was reimposed in 1947 (but in the amount of 130,000 tons instead of 126,033 tons) through action of the Commodity Credit Corporation and was allotted among the Puerto Rican refiners by that corporation.

The situation arose in the following fashion: From 1944 to 1947 the Commodity Credit Corporation purchased from the raw mills in Puerto Rico the available supply of raw sugar in excess of local needs. In the three years 1944, 1945 and 1946, the Commodity Credit Corporation designated the amount of raw sugar the raw mills might release to Puerto Rican refiners for refining for consumption on the mainland (R. 32-34, 67). During those years there was in actuality no limitation. The approval of such releases was automatic on the part of the Commodity Credit Corporation and refiners were free to refine and ship to the mainland whatever amount of sugar they could in competition with each other acquire or purchase from affiliated or non-affiliated raw mills (R. 113-114).

However, in 1947 the Commodity Credit Corporation established 130,000 tons as the total amount of releases of Puerto Rican raw sugar to be refined locally for mainland consumption. The corporation then allotted that amount by assigning to each Puerto Rican refiner an amount of raw sugar that could be released to him by the raw sugar mills for refining for mainland consumption. The following

table taken from CCC Letter No. 41 To Puerto Rican Producers of Raw Cane Sugar, issued April 25, 1947, by James H. Marshall, Director and Contracting Officer, CCC (see Appendix IV to this brief), sets forth the allotments made:

"Name of Manufacturer of Direct Consumption Sugar	1946-47 Crop Direct Consumption Sugar (short tons, raw value)
Aguirre	11,154
San Francisco	1,378
Western Sugar Refining Company	29,965
Roig Refining Company	27,183
P. R. American Sugar Refining Co.	60,320
Total	130,000"

Later in the year Porto Rican American asked for, but was refused, a larger amount (R. 158-159).

James H. Marshall who, as Director and Contracting Officer, CCC, made the allotments for 1947 by CCC Letter No. 41 and regarded them as fair despite the effect of "abnormal wartime conditions", is the same official who as Director of the Sugar Branch, participated in "working out" the allotments in Order 18 (R. 26). If approximately 30,000 tons each were fair allotments for Roig and Western in 1947, and only 60,000 tons for Porto Rican American, then it is difficult to see how only approximately 15,000 tons each for Roig and Western and 80,000 tons for Porto Rican American becomes "fair, efficient, and equitable" in 1948.

The use of an extra-legal non-statutory standard such as "restoration of prewar competitive relationships" in making the allotments for 1948 in Order 18, renders that Order invalid. A decision by the United States Court of Appeals for the District of Columbia Circuit in another connection is directly in point. During most of the period when sugar quotas and allotment powers under the 1937 Act were suspended by the President, allocation of sugar was still authorized by § 301 of Title III, Second War Powers Act, 1942,

in such manner, upon such conditions, and to such extent as the President deemed necessary or appropriate in the public interest and to promote the national defense. Subsequently Congress limited this allocation power by a prohibition against allocations dependent upon the existence of a concern or its functioning in a given field of activity at a given time, that is, a prohibition against allocations upon an "historical basis." § 203(b), War Mobilization and Reconversion Act of 1944 (58 Stat. 787). Notwithstanding this limitation, the Secretary and other officials enforced allocations of sugar made on an historical basis. In *Fleming* v. *Moberly Milk Products Co.*,[1] the court enjoined the Secretary from using the historical basis standard since it was not authorized by law. By enforcing such unauthorized standard, the Secretary was attempting to preserve past competitive relationships just as in our case he is attempting to do so by freezing competitors to their 1941 allotments and restoring prewar competitive relationships.[2]

The two situations are legally the same. In each instance allocations were based on an unauthorized standard. In our case the standard is unauthorized by law since Congress has carefully specified in detail in the Sugar Act of 1948 the three standards to be used and has not included among them the standard of restoration of prewar competitive relationships. In the *Moberly* case the standard was unauthorized by law since Congress had laid down a broad general standard and then carved out from it the standard of historical basis and prohibited its use

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[1] 82 App. D. C. 16, 160 F. 2d 259 (Ct. App., Dist. Col., 1947), cert. dismissed, 331 U. S. 786 (1947).

[2] To the same effect, but dealing with allocations by the Secretary to grain distillers on the basis of an unauthorized standard, is *Publicker Industries, Inc.* v. *Anderson*, 68 F. Supp. 532 (D. C., Dist. Col., 1946).

B. Order 18 is based on an erroneous construction of the ability to market standard.

1. The Statutory Standard of Ability to Market Means Present, not Past, Ability.—As one of the standards to be used the Act states "ability of such person to market or import that portion of such quota or proration thereof allotted to him." In other words, and applied to the present case, the statutory standard is the allottee's relative ability to market for 1948 whatever portion of Puerto Rico's refined sugar limitation for 1948 is allotted to him. The standard is one of ability to market in the immediate future—during 1948—not ability to market in the past. The proper measure of ability in the immediate future is current, not past, ability. The allottee's marketings in past years—his historical basis—are not a part of ability to market but are dealt with in the Act by the separate and distinct standard designated "past marketings." We deny flatly the statement in the Secretary's brief (p. 41) that either respondents or the court below agree with the Secretary that *past* performance (rather than *current* performance) is a permissible measure of present ability.

In Order 18 the Secretary has measured ability to market by the highest single year's marketings during the period 1935 to 1947, inclusive. The result is that Porto Rican American's ability to market refined sugar in the States in 1948 is measured by its past marketings of such sugar in the States in 1935, San Francisco by 1936, Guanica by 1939, and Roig by 1940, while the ability of Aguirre and Western is measured by 1947. In 1935 (13 years earlier) Porto Rican American, by reason of its monopolistic position, marketed the largest amount of sugar it has ever marketed in the States, 116,611 tons (R. 147). For no recent year has it approached that amount. In 1947 it marketed 60,820 tons (R. 147). The mathematical effect of the Secretary's interpretation of the ability to market standard is greatly to increase the allotment of

Porto Rican American at the expense of allotments to the other allottees.

The only previous instances in which the Secretary has, following a contested hearing, made allotments of the Puerto Rican refined sugar limitation, were in 1938 and 1939. In both these determinations the Secretary used, in measuring ability to market, two factors—*present* plant capacity and *current* marketings.

In determining allotments for 1938 the Secretary did not even go back to the then relatively recent year of 1935 to measure the ability of any allottee to market in 1938. On the contrary, the Secretary in April 1938 measured such ability one-half by "present" refining capacity, for which he took 1937 actual performance, and one-half by "current" marketings, for which he took deliveries into the States between January 1 and March 22, 1938 (Puerto Rico Sugar Orders Nos. 10 and 11, 3 F. R. 925 and 1279).

Neither in determining allotments for 1939 did the Secretary measure ability to market by going back to 1935. On the contrary, he again took the most recent year. In January 1939 he measured such ability three-fourths by "present" refining capacity, for which he took actual 1938 performance, and one-fourth by "current" marketings, for which he took deliveries into the States between January 1 and October 24, 1938 (Puerto Rico Sugar Order No. 13, 4 F. R. 59). In each instance only the most recent data was regarded as pertinent and used in determining ability to market.

Assuming *arguendo* that present refining capacity, i. e., physical ability to process, is not a measure of ability to market,[1] this would, on the basis of the Secretary's prior

[1] Order 18 omits present refining capacity as any measure of ability to market on the ground that "actual performance is considered a better measure than plant capacity" and then proceeds to use a performance that was "actual" only in 1935 in the case of Porto Rican American. This ignoring of present refining capacity especially discriminates in favor of Porto Rican American and against Roig. From 1939 to 1947 Porto Rican American's refining

determinations, leave current marketings as the measure. However, Order 18 omits this also. For both present refining capacity and current marketings Order 18 substitutes marketings as far back as 1935.

If the Secretary was right in his 1938 and 1939 determinations that ability of the allottee to market his portion of the quota means present ability as measured by current factors, then the Secretary is wrong in Order 18. The standard of ability to market reads the same in both the 1937 Act and the 1948 Act. It is submitted that substitution of 1935, 1936, 1939 and 1940 ability of various allottees for present ability is directly contrary to law.

2. Porto Rican American's Ability to Market in the States Has Greatly Decreased Since 1935.—Porto Rican American's ability to market in the States has decreased since 1935 by reason of three factors: First, competition from Roig and Western in years when there were no allotments of the refined sugar limitation; second, Porto Rican American's lack of capacity to supply the local market in Puerto Rico save at the expense of its marketings in the States; and third, Porto Rican American's decreased ability to obtain raw sugar supplies from unaffiliated outside sources.

During the period from 1935 to date the amount of the refined sugar limitation has been allotted among Puerto Rican refiners only four times prior to Order 18. These allotments were for the years 1935, 1938, 1939, and 1941.[1]

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capacity, according to the Government Witness, has decreased from 207,195 tons to 196,920 tons, while Roig's has increased (almost doubled) from 60,201 tons to 110,556 tons. Over the same period Western's refining capacity increased from 66,396 tons to 68,367 tons (R. 28, 149).

[1] For 1935, Puerto Rico Sugar Order No. 3, issued Apr. 2, 1935; for 1938, Puerto Rico Sugar Order No. 9 (3 F. R. 779, Mar. 31, 1938), amended by Order No. 10 (3 F. R. 925, Apr. 20, 1938), and Order No. 11 (3 F. R. 1279, June 3, 1938), and Order No. 11, Supp. 1 (3 F. R. 2785, Nov. 29, 1938); for 1939, Puerto Rico Sugar Order No. 13 (4 F. R. 59, Jan. 6, 1939), but this order was terminated Sept. 11, 1939; and for 1941, Puerto Rico Sugar Order No. 16 (5 F. R. 4748, Dec. 3, 1940).

Roig did not commence full-scale refining operations until 1937 and Western until 1938.[1] Previous to that they were solely raw sugar producers. Roig and Western, not being in operation, of course received no allotment under the order for 1935 and received only small allotments under the orders for 1938, 1939, and 1941. During the four years in which the amount of the refined sugar limitation was allotted there could consequently be no substantial competition which would affect Porto Rican American's ability to market, and the attempt is now being made to hold Roig and Western to the level of the drastically restricted competition for those years. However, in the years, such as 1940 and 1942 to 1947, when the amount of the refined sugar limitation was not being allotted, Roig and Western were free to compete with Porto Rican American in the acquisition of raw sugar and in its refining and marketing. That competition greatly decreased Porto Rican American's ability to market in the States, as is shown by the actual marketing figures (R. 147).

Turning to the second factor—during the war and postwar years the local Puerto Rican market for refined sugar was, by reason of transportation differentials and government price controls (R. 49) more profitable for Puerto Rican refiners than the export market in the States. In consequence there was a great incentive for Puerto Rican refiners to market locally rather than in the States. Porto Rican American was able to do so only by decreasing its continental marketings below those of the prewar period.

Comparing 1941 with 1947, and using round figures, Porto Rican American's total production of refined sugar decreased from 90,000 tons to 84,000 tons. It increased its local marketings by 12,000 tons, but to do so had to decrease its marketing in the States by 18,000 tons. On

[1] R. 147. Roig produced a small amount of refined sugar the previous year, 1936, when getting under way, and Western produced small amounts of turbinado sugar the previous three years, 1935-1937.

the other hand, Roig increased its total marketings from 22,000 tons to 44,000 tons and was able to increase *both* its local marketings and its marketings in the States by 10,000 and 12,000 tons, respectively. Also Western increased its total marketings from 19,000 to 46,000 tons and *both* its marketings locally and in the States by 10,000 and 17,000 tons, respectively. Porto Rican American chose to eat its cake and increase its more profitable Puerto Rican sales. It now asks the Government to ignore their demonstrated adverse effect on its ability to market in the States, and the Secretary has acquiesced. Conversely, in 1948 when Porto Rican American desired to justify its illegally excessive allotment, it produced 95,931 tons of refined sugar. It filled its allotment but only by reducing its local deliveries to around 13,000 tons as against 23,000 tons for 1947 and 30,000 tons each for 1945 and 1946.[1] Roig and Western, but not Porto Rican American, have the ability to increase their marketings locally without at the same time reducing the tonnage of their marketings in the States.

As to the third factor, lack of raw supplies, resulting in a decrease of Porto Rican American's ability to market, the situation is as follows: Porto Rican American's supply of raw sugars from its affiliated raw sugar mill, Mercedita,[2] is at best only about sufficient to meet its requirements for shipment of refined sugar to the States and is always far from sufficient to meet its requirements for refined sugar for both the local and continental markets. Inability to obtain sufficient raw sugar from outside non-affiliated mills has lessened Porto Rican American's ability to market refined sugar in the States.

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[1] See Appendix III to this brief. The other figures on which the above statements are based will be found in the record at pp. 12, 25, and 147.

[2] Porto Rican American formerly had a second affiliated raw sugar mill, Boca Chica, but that was taken out of operation in 1947 (R. 85-87).

In 1935 Porto Rican American's supply of raws from affiliated mills was 48,922 tons, but its outside purchases were 68,753 tons (R. 87). In 1948 its supply of raws from its affiliated raw mill was 60,982 tons, and its outside purchases were 35,243 tons.[1] Raw supplies from its affiliated mill have increased around 12,000 tons but at the same time raw purchases from outside mills have decreased around 34,000 tons.

Roig's supplies of raws from its affiliated mills, Ejemplo and Roig, and Western's supplies of raws from its affiliated mill, Igualdad, are more than sufficient for Roig's and Western's refining requirements.[2]

In the face of these facts it is not surprising that Porto Rican American insists that its present ability to market in the States be measured by marketings at a time (1935) when that ability had not deteriorated because of competition and large local marketings and when it had available outside raw supplies in an amount of about twice what it now has.

The Secretary was forced to use 1935 past marketings as the measure of Porto Rican American's present ability to market, if he were to achieve his objective of restoration of prewar competitive relationships. In doing so he has erroneously construed the statutory standard of ability to market.

C. Order 18 is based on an erroneous construction of the past marketings standard.

As another of the standards to be used the Act states "past marketings . . . of each such person."

In *Gay Union Corporation* v. *Wallace*[3] the court said, in an opinion by Judge (now Chief Justice) Vinson, that—

> " . . . There is no merit in the contention that restricting consideration of past marketings to the pre-

[1] See Appendix III to this brief. [2] Id.

[3] 71 App. D. C. 382, 112 F. 2d 192, 198, 199 (Ct. App. D. C., 1940), cert. denied 310 U. S. 647 (1940).

ceding four years arbitrarily discriminated against those whose marketing experience antedated that period. . . .

" . . . If a period of past marketings so remote that it would bear no reasonable relation to the present marketing situation was selected, such a selection might effect an arbitrary discrimination that would fall before the Fifth Amendment. . . . "

In Order 18 the Secretary has selected such a "remote" period. Order 18 measures past marketings for each allottee by going back to an average of its marketings in the States during the best five years of the 7-year period 1935 to 1941 and skipping over and leaving out of consideration the 6-year period 1942 to 1947. No doubt marketings during 1935 to 1941 are past, but so are those during 1942 to 1947.

In *Gay Union Corporation* v. *Wallace*, the appellant claimed that 1939 allotments should be measured by marketings prior to 1929—more than 10 years previously. The court sustained the Secretary in his refusal so to apply the standard and approved his use instead of "the most recent few years," namely, the four years immediately preceding the allotments. In Order 18 the Secretary abandons this position and goes back from 7 to 13 years in measuring past marketings.

Again the choice made by the Secretary results in discrimination in favor of Porto Rican American and against Roig and Western. The 7-year period 1935 to 1941 includes all of Porto Rican American's five highest years. It includes only two of Roig's five highest years and only one of Western's five highest years. In the first three years of the 7-year period Western had only insignificant shipments of turbinado sugar (R. 147).

The only times previously that the Secretary has considered the standard of past marketings in connection with a contested hearing on allotment of the Puerto Rican refined sugar limitation, were in 1938 and 1939. Then he did

not skip over to remote years. Porto Rican American was refining as far back as 1926 (R. 36) but the Secretary did not skip over six years to the 7-year period 1926 to 1932. On the contrary, he began with the last past year and went back three and four years. In April 1938 he determined past marketings by using marketings during 1937, 1936, and 1935 (Puerto Rico Sugar Orders Nos. 10 and 11, 3 F. R. 925 and 1279). In January 1939 he determined past marketings by using marketings during 1938, 1937, 1936, and 1935 (Puerto Rico Sugar Order No. 13, 4 F. R. 59). In accordance with this prior adminstrative practice the court below in our case stated that "'Past marketings,' as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them." (R. 196)

The years 1942 to 1947 were years when no allotments were in effect under the 1937 Act and competition was free from the restraints of that Act[1]. During 1942-1947 Porto Rican American's performance fell far short of its performance during 1935-1941. The average was 57,486 tons as against 100,070 (R. 147). The Secretary was forced to skip over the years 1942-1947 in measuring past marketings if he were to achieve his objective of restoration of prewar competitive relationships. In doing so he has erroneously construed the statutory standard of past marketings. Roig and Western do not contend that past marketings may be measured by marketings only during the years 1942 to 1947; in fact they suggested the use of the last ten years—1947 back through 1938 (R. 47, 120). They do contend, however, that marketings in the 1942-1947 period are past marketings and that the period used for measuring past marketings may not lawfully under the Act be arrived at by skipping over the years 1942-1947.

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[1] In 1947 there were allotments by the Commodity Credit Corporation pursuant to its raw sugar purchasing contracts. Porto Rican American's allotment was much lower and Roig's and Western's much higher than those set up in Order 18. See *supra*, pp. 49-50.

D. Order 18 is based on an erroneous construction of the statute in failing to give any weight to the proportionate shares standard.

As the third of the standards to be used the Act states "the processings of sugar . . . from . . . sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained." The Secretary gave no weight to this statutory standard on the ground that its use was not mandatory (R. 171, 169).

The three statutory standards, proportionate shares, past marketings, and ability to market read in the *disjunctive* in the 1937 Act. In consequence, the court in *Gay Union Corp* v. *Wallace, supra,* stated that the Secretary in making allotments was not required to employ all three standards, but might make use of any one or more of them in his discretion. However, in the 1948 Act, Congress changed the language so as to read in the *conjunctive* and this was the only change made in the three standards. In consequence, it is clear that the Secretary is now required to take into consideration all three standards in making allotments and the court below so held in our case. In using 1935, 1936, 1939, and 1940 past marketings to measure ability to market, and failing to give any weight to proportionate shares, the Secretary has wound up with using only one of the three statutory standards, namely, past marketings, as to four of the six allottees.

A farm's proportionate share is its share of the sugarcane required to be processed to enable Puerto Rico to meet its quota (Act, § 302(a)). The statutory allotment standard of "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained" is a standard measured by the processings of *raw* sugar from such cane by the allottee. Only raw sugar is processed from cane; refined sugar is processed from raw sugar.

In applying such statutory allotment standard to an allottee of the Puerto Rican mainland sugar quota, credit is

given the allottee only for its processings of proportionate share cane into *raw* sugar. In applying the statutory allotment standard to an allottee of the refined sugar limitation on that quota, the statute provides for no different rule. The allottee is to receive credit with respect to its processings of proportionate share cane into *raw* sugar.

Porto Rican American's own supply of raw sugar is inadequate to meet its refining needs, while Roig's, Western's, and other allottees' own supplies are more than adequate (see *supra*, pp. 56-57). Failure to use the statutory standard of proportionate shares again discriminates in favor of Porto Rican American and against all other allottees. In failing to give any weight to the statutory standard of proportionate shares the Secretary has erroneously construed the statute. The claim that the Secretary did give consideration to the standard by giving it zero weight convinces one only of the dialectic skill of his counsel.

The Secretary also says that the standard of proportionate shares is inapplicable to allotments of the Puerto Rican refined sugar limitation because three of the allottees, Porto Rican American, Roig, and Western, do not themselves directly process raw sugar from sugarcane but do so through an affiliated raw mill,—that the two legal entities differ (R. 168-169). This is a distinction, without pertinence in the matter of allotments, between an enterprise that uses a single entity to operate both its raw mill and refinery (as in the case of Aguirre, Guanica, and San Francisco) and an enterprise that for sound business reasons uses separate but affiliated entities to operate its raw mill and refinery (as in the case of Porto Rican American, Roig and Western). As the court below said—

> "No doubt facts of this sort may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all." (R. 197)

Roig and Western at the hearing on the Government's proposal for allotments took the position that the Secretary should not ignore any factor required by the Act to be considered but that a smaller weight should be given to proportionate shares than to the other two statutory standards (R. 123, 49).

We submit that an allottee of the refined sugar limitation is entitled to credit under the proportionate shares allotment standard for all *raw sugar processed by it or its raw mill affiliate from proportionate share cane and used by it for refining.* This rule does no violence to the statute. It is simple to apply and recognizes the increased ability of an allottee to assure fulfillment of its allotment to the extent that the allottee, or its affiliate, processes raw sugar, and therefore unquestionably *pro tanto* controls an available supply and is not compelled to rely on the contingency of purchases of raw sugar from outside unaffiliated raw mills.

E. Abnormal wartime conditions do not validate erroneous constructions of the statutory allotment standards.

"Abnormal wartime conditions" was the excuse advanced by the Secretary for his failure to use current performance in measuring ability to market and for his skipping over and omitting 1942 to 1947 performance in measuring past marketings (R. 172, par. 4, and 173, par. 8). His counsel now attempt to bolster this excuse by adding "abnormal weather conditions" during the years 1942 to 1947, at the same time admitting that the "Secretary found it unnecessary to explore that factor" (Br. 27,31). The Secretary argues that the statute gives him discretion to select representative years for the purpose of measuring ability to market and past performance and therefore to ignore all or any of the years 1942 to 1947.[1] The statute says

[1] Nevertheless the Secretary in Order 18 considers one of the years during this period, namely, 1947, representative of Aguirre's and Western's ability to market.

"ability to market" and "past marketings", not "ability to market and past marketings during a representative period to be determined by the Secretary", or "ability to market and past marketings adjusted for wartime, weather, or other abnormalities." The Secretary is asking this Court for a broad discretion that Congress did not see fit to give him.[1]

The evidence shows that wartime restrictions and dislocations (i.e., blackouts, gasoline rationing, island transportation, shipping space, etc.) were equally applicable to all three Puerto Rican refiners. Such restrictions and dislocations were "difficulties" to Porto Rican American, to which it testified complainingly at length (R. 63-81, 94-102). To Roig and Western these same restrictions and dislocations were not difficulties since Roig and Western were able to solve and surmount them (R. 61-62, 139). Even Porto Rican American, despite its purported difficulties, was throughout the war period able to market, in the same year as produced, all its refined sugar produced for marketing in the States, save in one year when a small amount was carried over until February of the following year (R. 88-89). Actually Porto Rican American, despite its complaint as to its distance from the wartime shipping port of San Juan, is located nearer San Juan than is Western.

Porto Rican American finally claimed that the difficulties that made the war years unrepresentative were difficulties that "balled up" *production* rather than marketing (R. 91).

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[1] In the Sugar Act of 1934 (48 Stat. 670, 673) Congress authorized the Secretary to fix *raw* sugar quotas on the basis of average quantities brought into continental United States "during such three years, respectively, in the years 1926-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative three years . . ." This Act did authorize the Secretary to determine a "representative" period in fixing the raw sugar quota for Puerto Rico. However, in the 1937 and 1948 Acts the three standards to be applied by the Secretary in allotting the refined sugar limitation for Puerto Rico are not coupled with an authorization for selection of a period that he deems to be "representative". Where Congress in sugar legislation has meant "representative" period it has said so.

Porto Rican American's real difficulties in supplying the States flowed, as heretofore set forth, from its local marketing policy and its competitive inability to purchase sufficient raws from unaffiliated mills. In no one year are marketing conditions precisely the same as in any other year. Admittedly during the war years many kinds of control were imposed on all of us. However, any realistic appraisal is bound to result in the conclusion that marketing conditions in 1948 were more nearly represented by those of the postwar years of 1946 and 1947 and even by those of the war years 1942-1945, than by marketing conditions during the prewar years, 1935-1941.[1]

"Abnormal wartime conditions" was a rationalization to excuse the failure to use any of the years 1942-1947 in measuring the standards of ability to market and past marketings to the end that the Secretary might manipulate the standards so as to produce the result of "restoration of prewar competitive relationships" and thereby reinforce Porto Rican American's prewar monopolistic position. "Abnormal wartime conditions" does not justify erroneous interpretation of the statutory standards.

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed on the ground that § 207(b) of the Sugar Act of 1948 is unconstitutional, or if this Court

[1] The opinion evidence of the Government Witness (R. 14, 28, 31-32) is directly contrary to the opinion evidence of the Witness Requa, who regarded marketings during the war period as entirely appropriate yardsticks for allotment purposes for 1948 (R. 115-116).

rejects that conclusion, then on the ground that the Order fails to conform to the requirements of § 205(a) of the Act.

Respectfully submitted,

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